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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1971

No. [redacted] 70-342

GEORGE K. MacPHERSON,
Petitioner,

v.

BOSTON AND MAINE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the

Supreme Court of the United States

October Term, 1971

No.

GEORGE K. MacPHERSON,
Petitioner,

v.

BOSTON AND MAINE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled cases on March 31,1971.

Opinion Below

There was no opinion in the United States District Court for the District of Massachusetts.

The opinion of the Court of Appeals for the First Circuit is annexed hereto as Appendix A.

Judgments Below

The judgment of the United States District Court for the District of Massachusetts was entered on December 1, 1970 and is annexed hereto as Appendix B.

The judgment of the Court of Appeals for the First Circuit was entered on March 31, 1971 and is annexed hereto as Appendix C.

Jurisdiction

The judgment sought to be reviewed was entered on March 31, 1971 and is annexed hereto as Appendix C.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1).

Questions Presented

1. Was there any evidence that negligence of the respondent contributed to the accident?
2. Did the decision of the Court of Appeals invade the function of the jury?

Statute Involved

45 U.S.C. secs. 51 et seq.

Statement of the Case

This is an FELA action by a railroad employee to recover damages for personal injury sustained when he slipped and fell while attempting to climb over a pile of snow.

At the close of evidence at the trial in the District Court before a jury, respondent's motion for a directed verdict was denied; subsequently the jury returned a verdict for petitioner and judgment was entered for the petitioner by the District Court. (Appendix B)

The Court of Appeals entered judgment reversing the judgment of the District Court (Appendix C) and filed an opinion on the same day. (Appendix A)

This is a petition seeking review of the judgment of the Court of Appeals.

The evidence adduced at the trial may be summarized as follows:

Petitioner was employed as a conductor on a local freight run distributing and picking up cars on a single track line between Somerville and the Sylvania plant in Marblehead.

In proceeding east from Somerville to Sylvania the engine was at the front of the train pulling freight cars, with a caboose at the rear of the train. In proceeding west from Sylvania to Somerville the engine was at the rear of the train pushing freight cars, with a caboose now at the front of the train.

Between Somerville and Sylvania there were multiple public crossings at which pedestrians and motor vehicles crossed the track. There were various protection

devices provided by the respondent to control movement of the train and the public over the crossings, but at some of the crossings there were no protection devices at all.

At those unprotected crossings, when the train was proceeding east, with the engine at the front, and with the engineer who controlled movement of the engine and train having the better view of the crossing, there was a practice to stop "10, 15, 20 feet" back of the crossing and a brakeman riding in the engine would then get off and proceed to the crossing and control movements of the train and public over the crossing.

At those unprotected crossings when the train was proceeding west, with the engine at the rear and pushing freight cars, and with the caboose now at the front of the train, movement of the train was controlled by hand motions passed by the petitioner and a flagman from the rear platform of the caboose to the engineer.

Further, there was a practice when the train was being pushed west over unprotected crossings, with the engineer now at the rear of the train and control of the train approaching the public crossing depending on proper interpretation of hand signals given and received at varying distances, depending on the number of freight cars intervening between the engine and caboose, for the men on the rear platform of the caboose to stop the train 35 to 40 feet from the crossing and for the flagman to get off

the caboose, proceed to the crossing and control movements of the train and public over the crossing. The reason for this practice was to allow a margin of error in case the engineer did not respond to the motions (R.71).

On February 2, 1966 the work had been completed at Sylvania and the train was being pushed westerly by the engine toward the Loring Avenue crossing, an unprotected crossing. The engine was about 200 feet east of the caboose, which was at the front of the train.

It was a practice for the respondent to plow snow alongside the south side of the track from the Loring Avenue crossing easterly from the crossing for a distance of 50 feet, which would provide a walking way to the crossing (R.34) from the location where the train usually stopped (35 to 40 feet east of the crossing) when being pushed westerly.

There were four snowstorms in January, 1966. After the first three the respondent plowed the snow from the south side of the track and left a pile of snow about 50 feet east of the crossing, the usual location of the pile. After the fourth snowstorm the respondent plowed the south side of the track again and left a pile of snow closer to, and between the usual 50 foot location and the crossing.

There were about 12 to 15 feet between the usual 50 foot location and the closer pile. The width of the base of the closer pile was about 10 feet. <u>There</u>

were 10 to 12 feet between the nearest portion of the closer pile and the sidewalk line of Loring Avenue and another 10 to 12 feet to the pavement of the Loring Avenue crossing. In order to stop the caboose between the closer pile and the crossing so as to utilize the cleared walking way between these 2 locations, the caboose would have had to have been stopped within 10 to 12 feet of the pedestrian sidewalk.

This closer pile was about 2-1/2 to 3 feet high and had a hard, crusted and creviced surface.

The petitioner complained 5 days prior to the accident to a section foreman of the respondent that the closer pile was not pushed back far enough to give walking way but nothing was done.

The caboose and train stopped at the usual location which placed the caboose between the 2 piles, and placed the closer pile between the petitioner and the crossing. He alighted onto the walking way on the south side of the track, and as he attempted to go over the top of the closer pile, he twisted and fractured his left leg.

Petitioner could have stepped between the corner of the caboose and the closer pile onto the track and thus proceeded to the crossing, but this would have violated a rule of the respondent that provided that employees should not go on to tracks within 10 feet of cars in case they start suddenly.

Reasons for Granting the Writ

I. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This Court has set down the test for judicial appraisal of the proofs to determine whether a jury question is presented in Rogers v. Missouri Pacific Railroad Company 352 U.S. 500. In the present case it is difficult to determine whether the Court of Appeals reversed because, 1. there was no proof of negligence of the respondent, 2. there was no proof that negligence of the respondent contributed in whole or in part to the injuries of the petitioner, or 3. that petitioner's conduct was the sole cause of his injuries.

Evidence of the piling of snow on a walking way along a railroad track in an obstructive manner prior to the accident and the failure to remove the obstructing pile by respondent after complaint by the petitioner, also prior to the accident, is proof of negligence of respondent.

Violation of its own practice to pile snow beyond the walking way provided is proof of negligence of respondent.

Considering all the circumstances of the scene of the accident and the relationship between the duties of the petitioner to the respondent and petitioner's duty to the public users of the Loring Avenue crossing, there was proof of the respondent failed to use reasonable care to furnish the petitioner

with a safe place to work within the meaning of the test applied by this Court in Bailey v. Central Vermont Ry., 319 U.S. 350.

Evidence of the practice to plow snow along the south side of the track and to pile the snow 50 feet back from the crossing is recognition and notice of the practice to stop the caboose 35 to 40 feet from the crossing, and is proof of foreseeability by respondent that petitioner would stop the caboose at the usual location on the day of the accident.

If the Court of Appeals reversed because there was no proof of causal relation between negligence of the respondent and petitioner's injuries, then petitioner says the Court of Appeals failed to apply the limited appraisal of the proofs prescribed by Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500.

If the Court of Appeals reversed because it found as a matter of law that petitioner's conduct was the sole cause of his injuries, petitioner says that in this case, as in Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500, the jury was instructed to return a verdict for the respondent if they found the sole cause for petitioner's injuries was his own negligence. It must be presumed the jury verdict was obedient to the trial judge's charge and that the jury found that petitioner's injuries resulted at least in part from negligence of the respondent.

With regard to the second question presented, petitioner says the Court of Appeals improperly invaded the function and province of the jury in this Federal Employers' Liability Act case as to the evidence and inferences to be drawn therefrom bearing on 1. proof of negligence of respondent and/or 2. proof as to causal relation between respondent's negligence and petitioner's injuries and/or 3. proof as to contributory negligence of petitioner. Petitioner says the principles set out in Gallick v. Baltimore and Ohio Railroad Company, 372 U.S. 108, support this contention.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Francis C. Newton, Jr.

Malone, McCarthy & Boluch
by Robert P. Malone
55 Union Street
Boston, Massachusetts
Attorneys for Petitioner

United States Court of Appeals
For the First Circuit

No. 7799.

GEORGE K. MacPHERSON,

PLAINTIFF, APPELLEE,

v.

BOSTON AND MAINE CORPORATION,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

John J. C. Herlihy for appellant.
Robert P. Malone for appellee.

March 31, 1971

ALDRICH, *Chief Judge*. This is an FELA suit, 45 U.S.C. §§ 51 *et seq.*, by MacPherson, a freight train conductor, against the Boston and Maine Corporation to recover damages for personal injury sustained when he slipped on a pile of snow. The sole question is whether the court erred in not directing a verdict for the defendant, which in turn raises the question whether there was any evidence that negligence of the defendant contributed to the accident. We recognize, of course, that this takes very little showing. *See Barboza* v. *Texaco, Inc.*, 1 Cir., 1970, 434 F.2d 121. Plaintiff's evidence was as follows.

Plaintiff was employed on a local freight run, distributing and picking up cars on a single track line between Boston and the North Shore. As conductor he was in charge

of the train. Whichever direction they were going, the engine would be at the east end, and the plaintiff, together with a flagman, would be in a caboose at the west end. On the day in question they were backing the train westerly towards the Loring Avenue crossing. This crossing was, like many others, unprotected by automatic signals. A company rule provided,

> "All moves over crossings must be stopped within 50 feet of the crossing and a member of the crew protect it."

This meant anywhere within the 50 feet. Plaintiff testified that when the train was proceeding forward and there was a crossing with an automatic signal it was customary to stop the engine at a stop post located a car length or about 40 feet from the crossing, and then to continue to within 20 feet of the crossing, when the automatic signal would be activated. Then, when the traffic had ceased on the crossing, the train would proceed. If, as at Loring Avenue, there was no automatic signal the engineer would proceed in the first instance to within "10, 15, 20 feet" of the crossing before stopping. A brakeman would then get off and protect the crossing.

When they were backing toward the Loring Avenue crossing the plaintiff would stand on the caboose rear platform with the flagman, who would be on the north side. The engineer would be on the north side of the cab. The plaintiff would direct the flagman. He, in turn, would give hand signals to the engineer indicating that they were three car lengths, then two, then one car length away from the stopping point, and then direct a stop, about 40 feet from the crossing. The flagman would get out and walk to the crossing.

On this day the crew was following its usual practice, which was not to cross Loring Avenue immediately, but to lock the train, walk to the crossing, and go to a restaurant.

The date was February. There had been four snowstorms. On the south side of the track, with which we are concerned, the railroad had plowed after the first three, and had left a pile of snow about 50 feet back from the crossing. After the fourth storm it had established a new pile, about 12 feet short of the first one. This pile ended 10 or 12 feet from the sidewalk, which in turn was 10 or 12 feet from the highway crossing. It was about 3 feet high, and had frozen. The week before, plaintiff had complained to a section foreman that this pile should not be there. Nothing had been done. Plaintiff caused the train to be stopped at the usual place, which placed the caboose platform between the two piles. He alighted on the south side and climbed over the second pile. In doing so he slipped and broke his leg.

The question is whether the defendant was negligent in leaving the second snow pile where it did. No specific attention was given at the trial as to the possible avoidability of doing so. We may wonder whether, once the first pile had been established, it would thereafter have been possible to have cleared the entire 40 feet back, since the two piles were only 12 feet apart. We will assume, however, in plaintiff's favor, that the jury could have found that this could have been managed. We will also assume in plaintiff's favor that he was excused from walking down the track itself, from which all snow had been removed.[1] However, we do not see why the defendant should have envisaged that the plaintiff would bring the train to a final stop at a point where he had to climb over the snow pile. While there was a safety custom of stopping 40 feet from the crossing, no rule, and no reason,

[1] A rule forbad walking on the track within 10 feet of a stopped train. The obvious purpose of such a rule was to guard against someone starting the train unexpectedly. Since in this case the engineer and fireman had also left the train, there could be no one aboard to start it.

have been suggested why plaintiff could not have started up again and brought the rear of the caboose to a stop in the space between the second snow pile and the crossing. The track was straight, and the engineer was accustomed to stopping on signal and spotting the rear end with precision.[2] Indeed, the only rules that were violated were rules violated by plaintiff himself. Defendant's safety rules instructed employees to be careful with respect to snow and ice, and to avoid obstructions where one could slip, trip or fall. Plaintiff well knew of this obstruction,[3] and having complete control as to which side of it the train should come to rest, there was no occasion for defendant to suppose that, for no purpose, he would walk over it instead of avoiding it. Having no reason to anticipate plaintiff's procedure, there was no negligence.

Reversed. Judgment for the defendant.

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[2] Q. "[T]here is no question that you, as you told us here, once he did bring it to a stop, you could have told him to move it back as little as six inches or as many feet as you wanted, isn't that true?" A. "Right." Those of us with long memories, who have seen freight and passenger trains made up, could take judicial notice of the correctness of this concession that control of the train is elementary procedure.

[3] Plaintiff's cases, which deal with a duty to warn, and a right to rely upon the defendant's taking customary precautions, are in no way relevant when the alleged defect was obvious and the plaintiff had both prior and present knowledge of it.

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GEORGE K. MACPHERSON

V

CIVIL ACTION NO. 68-105

BOSTON & MAINE CORPORATION

J U D G M E N T

CAFFREY, D.J.
December 1, 1970

The above-entitled action having come on for trial by the Court and a jury, and after trial and in accordance with the verdict of the jury, it is

ORDERED:

Judgment for the plaintiff GEORGE K. MACPHERSON against the defendant BOSTON & MAINE CORPORATION in the sum of $17,500.00.

By the Court,

Deputy Clerk

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APPENDIX C

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 7799.

GEORGE E. MacKINNON,
Plaintiff, Appellee,

v.

BOSTON & MAINE CORPORATION,
Defendant, Appellant.

JUDGMENT

Entered March 31, 1971

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court with instructions to enter judgment for the defendant.

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By the Court: